

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Appellant, )  
v. )  
PIERCE COUNTY and )  
PAUL MARTEL, )  
Respondents. )

SHB No. 84-26

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the request for review of a shoreline substantial development permit, came on for hearing before the Shorelines Hearings Board; Gayle Rothrock, Chairman, Lawrence J. Faulk, Rodney M. Kerslake, Richard A. O'Neal, Nancy R. Burnett, Members, convened at Gig Harbor, Washington, on August 27, 1984. William A. Harrison, Administrative Appeals Judge, presided.

Appellant Department of Ecology was represented by Jay J. Manning, Assistant Attorney General. Respondent Pierce County appeared by Robin Jenkinson, Deputy Prosecuting Attorney. Respondent Paul Martel

1 appeared by his attorney Ronald E. Heslop. Reporter Lisa Flechtner  
2 recorded the proceedings.

3 Witnesses were sworn and testified. Exhibits were examined. From  
4 testimony heard and exhibits examined, the Shorelines Hearings Board  
5 makes these

## 6 FINDINGS OF FACT

### 7 I

8 This matter arises in Pierce County on the mainland opposite Raft  
9 Island.

### 10 II

11 Respondent Paul Martel and his wife reside at the site in question  
12 which is waterfront property in a residential area. The water which  
13 they front upon is that lying between them and Raft Island. The shore  
14 of Raft Island is about 900 feet from their shore.

### 15 III

16 The mainland is joined to Raft Island by a bridge. Boats passing  
17 in front of the Martel residence cannot pass under the bridge at high  
18 tide unless they require less than twelve feet of clearance. This  
19 excludes many sailboats. Moreover, the depth of water beyond the  
20 bridge is quite shallow at low tide making it unusable to nearly all  
21 boats. On Martel's side of the bridge there is a deep channel  
22 allowing navigation at nearly all tides. Because of these  
23 circumstances, the water in front of Martel's residence has the  
24 character of a "dead-end" bay primarily navigated by those who reside  
25 on its shores. There are no public tidelands or other public land in

26 FINAL FINDINGS OF FACT,  
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1 the area in question.

2 IV

3 The Martels' lot and those adjacent to it were formerly in one  
4 ownership of 20 acres. In 1948, during the period of one ownership, a  
5 pier and float 330 feet long was constructed. This exists today.  
6 Although in disrepair, its original footings demonstrate that there  
7 has been no significant sedimentation or interference with littoral  
8 drift during its 36 years of existence.

9 The 330-foot pier is separated from the Martel lot by a lot  
10 containing a rental duplex and then by a vacant lot adjacent to  
11 Martel. The Martels do not own either of these properties nor the  
12 vacant lot adjacent to them on the other side of their property.  
13 There are presently no docks on any of these four adjacent lots.

14 V

15 There is an extensive tidal mudflat in front of the Martel  
16 residence. This is augmented by deposits from an upland stream which  
17 empties onto the mudflat at the site. The Martel bulkhead is up to  
18 eighty feet further landward than a line connecting the nearest  
19 bulkheads on either side.

20 VI

21 The Martels seek to construct a dock at their residence for  
22 moorage of their pleasure craft.

23 VII

24 The original Pierce County Shoreline Master Program was approved  
25 by Department of Ecology on April 4, 1975. Although not offered into

1 evidence on this record, we take official notice of its terms as set  
2 forth in our earlier decision of Kooley and Pierce County v.  
3 Department of Ecology, SHB No. 218 (1976). That original master  
4 program provided:

5 Residential docks on salt water, when allowed, shall  
6 meet the following design criteria:

7 1. Maximum length shall be fifty (50) feet or  
8 only so long as to obtain a depth of eight (8)  
9 feet, whichever is less at mean lowest low water.

10 Design Criteria, p. 99 (emphasis added).

11 In Kooley, the proposed development consisted of a pier, dock and  
12 float exceeding 50 feet in length (Finding of Fact I). Applying the  
13 master program to the proposed development in Kooley, we concluded  
14 that 1) a variance was necessary, and 2) Department of Ecology's  
15 denial of same was correct. We also stated, however:

16 ...a long, shallow tidal run-out is common in the  
17 area, and appellant and others similarly situated  
18 must seek relief by virtue of that circumstance  
19 through an amendment of the master program itself.  
20 That can only be accomplished by the county  
21 legislative body with the approval of the Department  
22 of Ecology.

## 23 VIII

24 Within one year after Kooley, Pierce County amended its master  
25 program to delete the language applied in Kooley. In lieu of that  
26 language which prescribes that docks shall have a maximum length of 50  
27 feet or obtain a depth of 8 feet whichever is less, the following was  
28 adopted:

29 A. Criteria - prior to the granting of a Substantial  
30 Development Permit, the County's reviewing  
31 authority shall make a determination that the  
32 proposed project is consistent with the policies

of the Master Program and with the following  
criteria:

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;
2. Views from surrounding properties will not be unduly impaired;
3. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
4. Public use of the surface waters below ordinary high water shall not be unduly impaired;
5. A reasonable alternative such as joint use, commercial or public moorage facilities does not exist or is not likely to exist in the near future;
6. The use or uses of any proposed dock, pier or float requires by common and acceptable practice, a Shoreline location in order to function;
7. The intensity of the use or uses of any proposed dock, pier and/or float shall be compatible with the surrounding environment and land and water uses.

B. Development guidelines - In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be applied by the County's reviewing authority to a site specific project application for Substantial Development Permit in arriving at a satisfactory degree of consistency with the policies and criteria set forth in this Chapter. To this end the County may extend, restrict or deny an application to achieve said purposes.

. . .

. . .

6. Single use piers and docks.

- 1 a. Maximum intrusion into water should be  
2 only so long as to obtain a depth of  
3 eight feet of water as measured at mean  
4 lower low water on salt water shorelines  
5 or as measured at ordinary high water in  
6 fresh water shorelines except that the  
intrusion into the water of any pier or  
dock should not exceed the lesser of 15  
percent of the fetch or 150 feet on  
saltwater shorelines and 40 feet on fresh  
water shorelines.

7 65.56.040 GENERAL CRITERIA AND GUIDELINES FOR  
8 REVIEWING SUBSTANTIAL DEVELOPMENT PERMITS.  
(Amended Res. #19803, June 14, 1977). (Emphasis  
9 added.)

10 Department of Ecology approved this amended language on October 26,  
11 1977. WAC 173-19-350. This is the language applicable to this,  
12 Martel, proposed development.

#### 13 IX

14 The current Pierce County Shoreline Master Program (PCSMP) also  
15 contains the following pertinent provisions:

16 With regard to joint-use docks:

17 Intent. It is the intent of Pierce County to  
18 encourage the construction of joint use or community  
19 docks and piers whenever feasible so as to lessen the  
20 number of structures projecting into the water. To  
21 this end, waterfront property owners are encouraged  
22 to explore the advantages of increased dock  
23 dimensions which are afforded by the construction of  
24 a joint or community use structure. PCSMP Section  
25 65.56.020, page 56-2.

26 With regard to buoys:

27 Uses permitted outright: ...

- 28 b. Anchor buoys limited to one per lot owner or one  
29 per 100 feet of shoreline frontage.

30 PCSMP Section 65.56.030A.1.b. and -030B, page  
31 56-3 and 4.

X

On December 30, 1983, respondent Martel applied to Pierce County for a shoreline substantial development permit. The proposed development consists of a pier, ramp and float totaling 250 feet in length. The proposed development would not reach the point of mean lower low water due to the long tidal run out. However, it would be usable for moorage 90 percent of the time. By contrast, a similar development only 150 feet in length would be usable for moorage 51 percent of the time.<sup>1</sup>

XI

On May 17, 1984, Pierce County approved a shoreline substantial development permit for the proposed development with these conditions:

1. The pier will be constructed in a workman-like manner in accordance with all codes and will be properly maintained.
2. No moorage buoy will be allowed for this site.

Department of Ecology requested this Board to review that permit by request received on June 25, 1984.

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1. Both the 90 percent and 51 percent usage figures assume a boat design which would be capable of resting on the bottom while moored, upright, to the dock. The Martels have purchased plans for such a boat design. By contrast, a buoy located in the same place as the end of the proposed 250-foot dock would not be usable so much of the time as there would be no supporting structure to hold it upright. A buoy providing usable time comparable to the proposed development would need to be located in the deep navigation channel waterward of mean lower low water. The proposed development would not impinge upon this channel.

XII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

Appellant, Department of Ecology, having requested review, bears the burden of proof in the proceeding. RCW 90.58.140(7).

II

We review the proposed development for consistency with the applicable (Pierce County) shoreline master program and the Shoreline Management Act (SMA). After the adoption of an applicable master program and its approval by Department of Ecology (DOE), we do not review a proposed development for consistency with the DOE Guidelines for Development of Master Programs, chapter 173-16 WAC. RCW 90.58.140(2)(a) and (b).

III

The Pierce County Shoreline Master Plan (PCSMP) does not require a variance for the proposed development. Both the language of Section 65.56.040(3) and its evolution from earlier language support this conclusion. In direct, unbroken sequence following our decision in Kooley, cited above, Pierce County amended its shoreline master program to delete the specific standard for dock length and substitute the concept that, "In lieu of specific standards relating to design, location, bulk and use, the following guidelines shall be



1 applied...". PCSMP Section 65.5.040B (emphasis added). The purpose  
2 of a variance is stated within WAC 173-14-150 of the DOE:

3 The purpose of a variance is strictly limited to  
4 granting relief to specific bulk, dimensional or  
5 performance standards set forth in the applicable  
6 master program... (Emphasis added.)

7 The stated purpose of a variance would be thwarted by applying it to  
8 Pierce County's unspecific guideline rather than a specific standard.  
9 Pierce County has repealed its specific standard for dock length in  
10 order to tailor its decisions to tidal run-outs of varying length.  
11 Dock proposals should be judged by the Pierce County guidelines as  
12 interpreted in Northey v. Pierce Co. and Marshall, SHB No. 84-6  
(1984), and not by the rules for shoreline variance.

#### IV

14 In Northey, cited above, we concluded that the word "should" is  
15 permissive rather than mandatory in the guideline for joint use docks,  
16 PCSMP Sec. 65.56.040B.7. We concluded, however, that special  
17 circumstances must exist which render a 150-foot dock impractical, and  
18 that a longer dock must have no significant additional adverse impact  
19 before a longer dock can be allowed. We interpret the single-use dock  
20 guideline, PCSMP 65.56.040B.6. (quoted in Finding of Fact VIII,  
21 above), similarly. Applying the latter guideline to this case, we  
22 conclude that special circumstances in the form of a long tidal  
23 run-out augmented by the setback of the bulkhead would render a  
24 150-foot dock impractical at the site in question. The proposed  
25 250-foot dock was not proven to have any significant additional  
adverse impact on view, navigation, beach sediments or other concerns

1 within PCSMP Section 65.56.040. We conclude that the proposed  
2 development is consistent with that section.

3 V

4 Although it is the intent of Pierce County to encourage the  
5 construction of joint use docks whenever feasible, PCSMP Section  
6 65.56.020 quoted at Finding of Fact IX, above, such feasibility was  
7 not proven. The objective of lower dock density, apparent in the  
8 definition of joint use docks as being for not more than four lot  
9 owners, PCSMP Section 65.56.010J., is served by the proposed  
10 development in that it would be the only dock on four adjacent lots.  
11 We conclude that the proposed development is consistent with PCSMP  
12 Section 65.56.020.

13 VI

14 The policies for piers within the PCSMP recite that:

15 (d) Piers associated with single family residences should be  
16 discouraged.

17 and

18 (f) Encourage the use of mooring buoys as an alternative to space  
19 consuming piers such as those in front of single family residences.

20 PCSMP Use Activity Policies, p. 37 (blue volume). At page 21 (blue  
21 volume) it states:

22 Use Activity policies are a means of guiding types,  
23 locations, designs and densities of the future  
24 shoreline developments. These general policies are  
implemented by the use regulations which are included  
in Phase II of the Master Program.

25 The means chosen by Pierce County to "discourage" and "encourage" is

26 FINAL FINDINGS OF FACT,  
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1 therefore the use regulations of chapter 65.56 PCSMP relating to piers  
2 and docks. Having found consistency between the proposed developmet  
3 and the use regulations (chapter 65.56 PCSMP) cited by the parties, we  
4 also conclude that there is consistency between the proposed  
5 development and the policies for piers which the use regulations  
6 implement. The meaning of the policies quoted above appears to be  
7 that piers associated with single family residences should be  
8 discouraged where inconsistent with the guidelines for such piers  
9 which are established in the use regulations (e.g., PCSMP  
10 65.56.040B.). Piers associated with single family residences are a  
11 permitted use under PCSMP 65.56.030 of the use regulations.

12 VII

13 The proposed development has not been shown to be inconsistent  
14 with RCW 90.58.020.

15 VIII

16 Any Conclusion of Law which should be deemed a Finding of Fact is  
17 hereby adopted as such.

18 From these Conclusions of Law the Board enters this  
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ORDER

The shoreline substantial development permit granted by Pierce County to Paul Martel is hereby affirmed

DONE at Lacey, Washington, this 4<sup>th</sup> day of October, 1984.

SHORELINES HEARINGS BOARD

See Dissenting Opinion

GAYLE ROTHROCK, Chairman

Lawrence J. Faulk 9/26/84  
LAWRENCE J. FAULK, Vice Chairman

Rodney M. Kerslake  
RODNEY M. KERSLAKE, Member

Richard A. O'Neal  
RICHARD A. O'NEAL, Member

Nancy R. Burnett  
NANCY R. BURNETT, Member

William A. Harrison  
WILLIAM A. HARRISON  
Administrative Appeals Judge

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
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1 DISSENTING OPINION - ROTHROCK

2  
3 I disagree with the majority in affirming issuance of the subject  
4 substantial development permit. I would remand the permit to Pierce  
5 County for review of the permit application for a 250-foot, joint use  
6 dock under variance criteria, or alternately, vacate the permit  
7 altogether.


8 Appellants represented that a 250-foot dock constructed out over  
9 gently sloping tidelands is the type of dock they find possible to use  
10 90 percent of the time; that a 150-foot dock is not what they desire  
11 or could use more than 50 percent of the time. Appellants Martel  
12 have used other moorage, but desire to construct a large boat and moor  
13 it conveniently in front of their new home 90 percent of the time.  
14 Presumably, other moorage would be required 10 percent of the time.

15 The PCSMP, at 65.56.040(B)(7)(a) provides that intrusion into the  
16 water of any joint-use pier or dock "...should not exceed the lesser  
17 of 15 percent of the fetch or 150 feet on salt water shorelines...".  
18 This serves as a length limit which should be upheld unless a dock  
19 project can pass the tests of variance criteria. Otherwise, there is  
20 no good basis for determining whether a longer dock is allowable and  
21 in the public interest. The Pierce County planning staff and the  
22 hearing examiner will struggle to articulate reasonable decisions  
23 without real test standards available to employ in determining whether  
24 a permit should issue, absent the use of WAC 173-14 variance criteria.

25 The requirements in the SMA at RCW 90.58.020 and in the PCSMP at  
26  
27

1 65.56.040(A) to have permitted projects be consistent with the  
2 policies of the Shoreline Management Act and of the PCSMP are not met  
3 here. These criteria become the only ones available to use, however,  
4 for a permit reviewer in any joint-use dock application in Pierce  
5 County, unless variance standards are acknowledged to be a necessary  
6 and logical part of the review. Evaluating the criteria of  
7 65.56.040(A) here, the dock project would impair views of the island  
8 and waters, would interfere with the public's use of and access to  
9 surface waters (particularly fishing, rowboating and canoeing), would  
10 intensify overwater uses in the area unnecessarily and ample adequate  
11 moorage and public launching facilities already exist nearby. This  
12 proposed dock, as set forth in the Board record made in this case,  
13 fails these policy consistency tests at PCSMP 65.56.040(A).

14 While Pierce County is known for its cruising waters, marine  
15 recreation opportunities and ample moorage (buoys, marinas, docks),  
16 there is nothing in that reputation compelling a stretching of the  
17 PCSMP and the SMA to entertain, only under substantial development  
18 permit review, oversize docks on gently sloping intertidal areas to  
19 accommodate very large boats when there are so many satisfactory and  
20 easily available alternatives and so many potential adverse impacts.

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24 GAYLE ROTHROCK, Chairman  
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